FOO YIN SHUNG & ORS.

v.

FOO NYIT TSE & BROTHERS SDN. BHD.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[COMPANIES WINDING-UP NO. 10 OF 1983]
17 FEBRUARY 1989

COMPANY LAW: *Winding Up - Whether directors acted in their own interests - Complaint by petitioners - Whether sufficient to bring into operation ss. 218(1)(f) or 218(1)(i) Companies Act 1965 - Interpretation - Whether Court should be induced to order winding up of the respondent company.*

The respondent company was incorporated pursuant to a deed of family arrangement signed by all beneficiaries of the deceased's estate with the object of acquiring all the assets and liabilities of one deceased Foo Nyit Tse. The 1st petitioner is among one of the beneficiaries who signed the deed of family arrangement but not the other petitioners.

The petitioner sought a winding-up order against the respondent company on two grounds, under s. 218(1)(f) and s. 128(1)(i) respectively of the Companies Act 1965.

The petitioner relied on the following transactions to establish that the directors of the respondent company have acted in their own interests rather than the interest of the shareholders as a whole:

(1) the attempt of the 1st petitioner to purchase shares of the respondent company offered for sale by the other directors was rejected and instead he was only allowed to purchase a small number of shares.

(2) that 4 subsidiary companies which were formed and/or purchased by the respondent company were of no real benefit to the respondent company and the petitioners have been deprived of information about the subsidiaries.

(3) the directors of the respondent company had bought expensive cars and drew large remuneration from the respondent company and they only worked half a day.

(4) the paid up capital of the respondent company had been vastly increased and resulted in payment of small dividends recently.

The petitioners also relied on the following transaction to establish their allegation that the directors had acted in a manner which was unfair or unjust to the members i.e. that the directors of respondent company in resorting to circular resolutions instead of board meetings to decide on projects and expenditure shows the dictatorial fashion of one of the directors.

The crucial question before the Court is whether the above transaction and/or complaints is sufficient to bring into operation s. 218(1)(f) or s. 218(1)(i) of the Companies Act 1965 and thereby warrants the Court to exercise its discretion to order the winding-up of the respondent company.

Held:

[1] None of the complaints have been proved to the Court's satisfaction so as to bring into operation s. 218(1)(f) and s. 218(1)(i) of the Companies Act 1965 and even assuming that the transactions alleged were proved, none of such transactions could be sufficient to amount to an infringement of the rights of the petitioners under the above two grounds.

[2] Even if the Court were to assume that the transactions set out by the petitioners were such infringement, the extent of such unfairness or unjustness etc. was not such as to induce the Court to order the winding-up of the respondent company.

[3] On the interpretation of s. 218(1)(f) of the Companies Act 1965, the Court is of the view that in the first limb of the sub-section the words "interest of members as a whole" mean a situation where directors are shown to have preferred their own interest to the interest of one or more members of the company.

[4] The second limb of the sub-section which contains the words "unjust or unfair to members" are not technical terms of law which its meaning is best left to the surrounding circumstances of each case and giving due consideration to the extent of the unfairness or unjustness of the case in deciding whether to exercise the Court's discretion to make the winding-up order.

[5] As to situations within "just and equitable" clause under s. 218(1)(i) of the Companies Act 1965, the Court is of the view that there should not be a tendency to create categories under which cases must be brought under this provision and general words should remain general, and not be reduced to the sum of particular instances.

[Petition dismissed with costs.]

Cases referred to:
Re Cumberland Holdings Ltd. [1976] IACLR 361
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1978] 2 MLJ 227
Ebrahimi v. Westbourne Galleries Ltd. [1973] AC 360
Loch v. Blackwood Ltd. [1924] AC 783

Legislation referred to:
Companies Act 1965, ss. 218(1)(f), (1)(i)
Companies Act [Aust], s. 222(1)(f)

For the petitioners - M. Nagarajah; M/s. Shook Lin & Bok
For the respondent - S. Viswanathan; M/s. Kean Chye & Sivalingam

JUDGMENT

Peh Swee Chin J:

This case involved also the interpretation of s. 218(1)(f) of the Companies Act 1965 which did not seem to have dealt with by any Malaysian Court in any reported judgment, a situation no doubt partly brought about by the fact that s. 218(1)(f) was transplanted from Australia in 1965, the same not having been in United Kingdom's Companies Act 1948, or our previous Companies Ordinance 1946.

It reads as follows:

> 218. (1)
>
> (a) ... (b) ... (c) ... (d) ... (e) ...
>
> (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;
>
> (g) ... (h) ...
>
> (i) the Court is of opinion that it is just and equitable that the company be wound up.

It will be more convenient to set out my views on s. 218(1)(f) before dealing with the facts so that the latter can be seen in their proper perspective, fortunately with the help of an Australian case on the same section, *viz. Re Cumberland Holdings Ltd.*, [1976] 1 ACLR 361.

Section 218(1)(f) has two limbs, the first limb containing the phrase, *inter alia*, "interests of members as a whole" and the second, the phrase, *inter alia* also, "unfair and unjust to other members."

About the phrase, "interests of members as a whole", I have adopted respectfully the interpretation of Bowen CJ in Equity of New South Wales Supreme Court in *Re Cumberland Holdings Ltd.* that the phrase means a situation where directors are shown to have preferred their own interests to the interests of one, or more or perhaps some significant section of the members so that the action of directors may be open to challenge notwithstanding that it coincides with the interests of the majority shareholder. The test in connection with such challenge seems to be that the said s. 218(1)(f) or para. (f) applies when the directors are seen not have been acting in the interests of all the members and cannot be said therefore to have been acting in the interests of members as a whole.

It will be seen therefore that the scope of the para. (f) is very wide indeed, it can cover a great number of situations which would lie outside, e.g. s. 181 of the Companies Act 1965 in connection with "oppression" or "disregard" as judicially explained in a number of reported cases in Malaysia, notably *Re Kong Thai Sawmill (Miri), Sdn. Bhd.* [1978] 2 MLJ, 227 PC.

The second limb of para. (f) regarding the phrase "unjust or unfair to members" was unfortunately not elucidated by his Lordship in *Re Cumberland Holdings.*

The words "unjust or unfair", are not technical terms of law but are ordinary words which will certainly defy attempt of precise legal definition, as, e.g. even the meaning of the words "justice" has been debated for centuries by eminent thinkers. For the purpose of law, their meaning is best left to its highly flexible state, though the words should have reference in my view to some commercial morality or integrity which the law ought to uphold or sustain, having regard to all the surrounding circumstances.

I have mentioned also commercial morality or integrity because the words *viz.* "unjust and unfair" should also be subject to equitable considerations, i.e. as described by Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] AC 370, as equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or exercise them in any particular way. Although his Lordship gave the description when interpreting the provision of "just and equitable" for winding up a company, (that is, para. (i) of our Companies Act 1965, where the word "equitable" is used, but not used in para. (f) under discussion presently,) the words "unjust and unfair" would lend themselves to such superimposition of such equitable considerations on themselves.

In connection with the second limb of para. (f), I am in entire agreement with Bowen CJ that the extent of the unfairness or unjustness will be important for consideration by the Court in deciding whether to exercise its discretion to make a winding-up order; that the conduct does not have under the second limb, to be shown to be unfair or unjust to members as a whole, and that it is sufficient if it is unfair or unjust at least to any significant body of other members and perhaps to any member.

On appeal to the Privy Council, Bowen CJ's decision was reversed on facts, nonetheless his Lordship's interpretation of so much of s. 218(1)(f) (Australian s. 222(1)(f)) would appear to remain unscathed. Lord Wilberforce in the Privy Council, delivering judgment on appeal would

seem to echo Bowen CJ's concern about the extent of unfairness and unjustness by saying that to wind up a successful and prosperous company which was properly managed must be clearly an extreme step and must require a strong case to be made.

It would not be necessary to set out a multitude of cases which have been decided under the "just and equitable" clause. Two propositions bear repetition.

The first is from Lord Wilberforce in *Westbourne Galleries* to the effect that there should not be a tendency to create categories under which cases must be brought under this provision of "just and equitable". His Lordship said, to quote:

> This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances, and no shareholder should be prevented from relying upon any circumstances of justice or equity which would affect him in his relations with the company.

The second proposition is from Lord Shaw of Dunfermline in *Loch v. John Blackwood Ltd.* [1924] AC 783, 788, in which he said as follows:

> It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

Now I deal with the facts. The respondent/company, (hereinafter called the company) was incorporated in 1940 as a private limited company, the object, *inter alia*, for which the company was established, was to acquire all the assets and liabilities of the estate of one Foo Nyit Tse; deceased who was a man of great wealth and who had died in 1934.

Before such incorporation, a deed of family arrangement was made on 29 September 1947 and it was purportedly signed by all beneficiaries of the estate. The important point was that it was signed also by Mr. Foo Yin Shung, the *dominus litis* in the petition; there were three other co-petitioners, but the latter were not the original beneficiaries of the estate or the shareholder of the company, they having been "trustees" of an estate, presumably the estate of a deceased beneficiary of the estate of Foo Nyit Tse or of some original shareholder of the company. Please see p. 2 of the notes of evidence of Mr. Foo Yin Shung (PW1), the *dominus litis* referred to above. None of the other 3 petitioners had given *prima facie* evidence that they were in a position to sign the deed of family arrangement but they either refused to sign it or were not even invited to do so.

Various attacks were launched by the petitioners. Before dealing with them, it would be more convenient to deal with a rather vehement objection of learned Counsel for the petitioners on the question as to whether affidavits filed by or on behalf of the company could be read by the Court.

At the commencement of the hearing of the petition, both Counsel applied for oral evidence to be taken on the petition at a time when Privy Council had not then heard the appeal in *Tan Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ, 433. The Court allowed the application.

When Mr. Foo Yin Shung the only witness called by the petitioners, concluded his evidence, learned Counsel for the company declined to adduce any oral evidence at all. Submissions were then made.

Learned Counsel for the petitioners submitted that, to quote: "But the deponents of affidavits filed by the respondent have failed to attend Court and subject themselves to cross-examination," therefore such affidavits of the respondent could not be read. Learned Counsel for the company said the relevant order of Court was not an order for oral evidence to be led instead of affidavit evidence and submitted that the objection should be dismissed.

Indeed, nothing was further from the mind of the Court than the exclusion or preclusion of affidavit evidence when the Court made the order in question at request of both learned Counsel. Para (2) of the head-note regarding the decision of the Privy Council in *Tahansan* would appear to set out accurately the judgment of Privy Council, to quote:

> ... in civil proceedings, the trial Judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings, the trial Judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him, unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend.

It will be evident that no order for cross-examination of any particular deponent herein was ever made; and Counsel's objection therefore rested on a basis which did not exist, the objection was therefore dismissed.

Learned Counsel for the petitioners in his submission confined himself to only two grounds, *viz.* under ss. 218(1)(f) and 218(1)(i) respectively of the Companies Act 1965, (hereafter called the Act), i.e. the ground of directors having acted in the affairs of the company in their own interests rather than in the interests of members as a whole or in any other manner whatsoever which appeared to be unfair and unjust to other members and the other ground that it was just and equitable that the company be wound up.

In the petition filed, the ground under the first limb of s. 218(1)(f) was expressly and alone relied on only with regard to transactions as set out in para. 9 of the petition, and similarly, the second limb of s. 218(1)(f) with regard only to para. 10 of the petition. All this was borne in mind by the Court, and the rest of the paragraphs of the petition in so far as they dealt with transactions giving rise to complaints were dealt with by having in mind both the grounds.

Paras. 5 to 8, considered together with Counsel's submissions thereon, primarily dealt with the impropriety of the assets of the estate of Foo Nyit Tse, deceased, being taken over by the company, and learned Counsel called it a breach of trust.

Assuming even that it was a breach of trust, Mr. Foo Yin Shung was a party to the deed of family arrangement providing for the matter complained of, and that fact constituted express consent. The other petitioners, being shareholders by transmission could not possibly withdraw a consent without also the consent of all other relevant parties to the deed of family arrangement, the first-mentioned consent having been most probably given by the deceased for whose estate, they represented. Further, Mr. Foo Yin Shung was himself a director of the company from 27 November 1971 to 27 November 1981 and that spectre of the alleged breach of trust did not make its presence felt anywhere during such period.

Should it be said elsewhere that such express consent, which I found on a balance of probabilities, should not preclude the petitioners from questioning the propriety of the company being incorporated for the purpose of taking over the assets of the deceased, then,

the words of Lord Wilberforce in *In re Westbourne Galleries*, cited above, would come to mind so that applying them to the circumstances herein, the circumstances would make it unjust or inequitable for Mr. Foo Yin Shung to petition the winding up of the company on ground of the company taking over the assets of the said Foo Nyit Tse, deceased, for he had given his express consent to it. There seemed to be another complaint, though not that clearly expressed, to the effect, that without winding up, it would be impossible for the petitioners to realize the true value of their shares.

The allegation was not proved to the satisfaction of the Court. The Court was not acquainted with such true value of the shares. For one thing, no balance sheet and profit and loss account for the previous year or any other relevant years were produced from which the Court could at least have an inkling of the value of the net-asset backing for the shares. The Court could not really begin even to consider the situation.

I now deal with the instances in respect of which the directors of the company were said to have acted in their own interests rather than in the interests of shareholders as a whole, under the first limb of s. 218(1)(f).

First, Mr. Foo Yin Shung complained that his attempt to purchase 13,200 shares at RM1.50 each, accompanied by the bank draft, as offered by the directors was rejected and that he was allowed only 2,612 shares which were later "grabbed up" by two of the directors.

A director for the company explained by affidavit that when more than one shareholder wanted to purchase any shares offered for sale by another shareholder, the directors were authorised to offer the shares in proportion to respective sharesholding of the members interested. Mr. Foo Yin Shung, it was said, did not take up his entitlement on such proportional basis and so other members purchased the same in such manner. That was in 1975. The implied allegation that the directors had denied him his entitlement was therefore not substantiated.

Another complaint was that 4 subsidiary companies that were formed or purchased, were of no real benefit to the company, and in particular, Tong Pin Mining Sdn. Bhd. which had no assets at all and which was purchased for RM10,000 by the company.

The petitioners asked the Court to believe in the lack or absence of benefit, (save as regards Tong Pin Mining Sdn. Bhd. which I would comment on later on), which they had patently failed to prove. Even assuming such subsidiary companies proved to be subsequently of no real benefit, then, unless fraud or *mala fides* was proved, the formation or purchases of these subsidiary companies should be regarded in the light as business ventures which would always inherently involve a risk of loss, or they would have been the domestic policies of the board which the Court would feel disinclined to interfere with.

As to the said Tong Pin Mining Sdn. Bhd., a director had explained that it was purchased not for its assets, but for a tax loss of RM100,000. This was not contradicted by the petitioners. It would not be difficult to understand such tax loss of RM100,000 against which, should the company resume mining or doing business and make profit, such profit could be set off, thus potentially reducing significantly its income tax liability. Thus the petitioner had failed to prove that these subsidiary companies were not of real benefit.

In this connection, the petitioners also complained of having no information about the subsidiaries. The respondent had replied that balance sheets and profit and loss accounts of the company were consolidated ones incorporating those of the subsidiaries. It was implicit that all members would have received copies of the same. They could have also asked about them at the general meetings of the company. The complaint was not substantiated.

Another complaint was that the directors had bought expensive cars, and drawn large remunerations. No particulars were given. The Court was left speculating with itself as to what sort of cars and remunerations they were. The petitioners had failed to prove the same.

The petitioners next complained of increase of paid-up capital, resulting in payment of small dividends nowadays. The respondent had explained that the original paid-up capital was RM673,200 which was increased by 2 bonus issues, first in the ratio of 7 for 1 and the second, 1 for 1 to the present paid-up capital of RM10,771,200 and that the present dividends, on a comparative basis with the original paid-up capital, should be multiplied by 16. Thus, in 1966, the rate was 200%, and the present rate of 20% would be equal to the effective rate of 320% i.e. 20% x 16.

Again I found this complaint had not been substantiated.

Yet another allegation was that the directors had worked ½ day despite being well paid. Again, no particulars were given. The Court again was compelled to speculate and no decision could be made on such pure speculation without the slightest basic materials to work on.

I now deal with para. 10 of the petition which contained transactions which the petitioner said were instances where the directors had acted in a manner which was unfair or unjust, i.e. the second limb of s. 218(1)(f) of the Act.

First, it was said that the directors resorted to circular resolutions, instead of board meetings to decide on projects and expenditure. Regarding such circular resolutions, the petitioners' point was not that the use of such circular resolutions was *ultra vires* the memorandum and articles of association but was rather to show the dictatorial fashion of one of the directors. The fact that another of the directors had refused to sign a circular resolution, in respect of one *Sandalwood Farms Pty. Ltd.* would in my view, amount to a vote against the acquisition of Sandalwood Farms Pty. Ltd., in question. Generally speaking, a resolution of the board of directors would usually be carried by more votes for it than against it. That dissenting director was most probably over-ruled by the majority of directors and nobody had suggested that dissenting director had even intended to take any proceedings in Court. Nothing improper had been proved again.

None of the complaints had been proved to my satisfaction so as to bring in the operation of s. 218(1)(f) or s. 218(1)(i). Assuming that they were proved, none of such complaints, could be sufficient to amount to any infringement of the rights of the petitioners under the 2 grounds. Assuming further that the transactions set out by the petitioners were such infringements, the extent of such infringements, or to be more precise, the extent of such unfairness or unjustness etc. was not such as to induce the Court to exercise its discretion to order a winding-up of the company. The company, though not a dynamic one, was nonetheless, having regard to undisputed allegations, a prosperous and successful one.

In the circumstances and for the reasons stated, the petition was dismissed with costs.

Also found at [1989] 2 CLJ 419